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OMBUDSMAN

BULLETIN

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Disability and Incapacity issues

1. Enduring powers of attorney (EPAs) - summary of new Victorian legislation

Introduction

Changes to Victorian legislation regarding enduring powers of attorney (EPAs) mean that bank officers will need to pay close attention to the content of an EPA presented to them and not just the form.

The relevant legislation, the Instruments Act 1958, was amended in October 2003 by the Instruments (Enduring Powers of Attorney) Act 2003. The amendments will come into effect on 1 April 2004.

The following information (in italics) has been provided by VCAT (the Victorian Civil and Administration Tribunal), Guardianship List. It is included in this Bulletin to assist banks and other members of the BFSO scheme and in the interests of minimising disputes either about unauthorised operation of an account by a person claiming to have power of attorney or about failure to allow the legitimate use of a valid EPA. It includes information about what an EPA in the new form may contain, what form it must be in, how it is proved and how it may be revoked. It is not intended to be a substitute for a member's own internal advice.

For further information - including information about EPAs made in other States and Territories and the approved Victorian forms - see the websites under the heading below, "Further information online".

Summary of changes and main features

- Previously, enduring powers of attorney came into operation and could be used immediately they were made. The person giving the attorney power over their affairs (the donor) can now specify the time from which, the circumstances in which or the occasion on which the power may be exercised;
- The donor can now limit the power of attorney or attorneys appointed to particular matters and can include instructions about or conditions on how a power may be exercised;
- The donor may revoke the EPA in writing in the approved form;
- VCAT can revoke an EPA, declare it invalid (in which case it is void from the start), vary or suspend an EPA or make a declaration, recommendation, directions or any other necessary order;

- Attorneys or third parties, such as banks, are protected if they rely in good faith on an invalid EPA without knowing or having reason to know that it is invalid;
- An EPA made before 1 April 2004 under the *Instruments Act* 1958 has effect on and after that date as if made under the amended legislation;
- If an EPA is made in another State or Territory (whether before or after 1 April 2004) and complies with the requirements of that place then, to the extent that the powers the EPA gives could validly have been given by a Victorian EPA, the interstate EPA is to be taken to be an EPA made under the Victorian legislation.

From the Victorian Civil and Administrative Tribunal

Making an EPA

The donor may give an EPA to one or more attorneys aged at least 18 years and so authorise them to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do.

The donor may provide in the EPA conditions and limitations on, and instructions about, the exercise of the power.

The donor may appoint a sole attorney or 2 or more joint attorneys (who can act only if they both or all agree and who must both or all sign any documents) or 2 or more joint and several attorneys (who may act and sign together or alone). A donor may appoint an alternative attorney who may act only in the event of the death, or during the absence or legal incapacity, of an attorney.

A donor may specify in an EPA a -

- *time from which*
- *circumstance in which*
- *occasion on which -*

a power is exercisable. If the EPA does not specify any of these things, the power is exercisable once the EPA is made.

A donor has capacity to make an EPA only if the donor understands the nature and effect of the EPA. This includes understanding -

- *that the donor may specify conditions and limitations on, or instructions about, the exercise of the power;*
- *when the power is exercisable;*
- *that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given, subject to any limitations or restrictions in the EPA;*

- *that the donor may revoke the EPA at any time the donor is capable of making an EPA;*
- *that the power continues even if the donor ceases to have legal capacity; and*
- *that at any time that the donor is not capable of revoking the EPA the donor is unable to effectively oversee the use of the power.*

An EPA must be in the approved form (or to the like effect of the approved form), signed by the donor (or signed by a person at the donor's direction and in the donor's presence), and signed and dated by 2 adult witnesses in the presence of the donor and each other.

The person who can sign for the donor must be aged at least 18 years and be someone who is not a witness to the EPA, or an attorney. The witnesses cannot be the donor or an attorney and only one of them can be a relative of the donor or the attorney. In addition, one of the witnesses must be a person authorised by law to sign a statutory declaration.

Each witness must certify that -

- *the donor signed the EPA freely and voluntarily in the presence of the witness; and*
- *at the time, the donor appeared to the witness to have the capacity necessary to make the EPA.*

If an EPA is signed by a person for the donor it must include a certificate signed by each witness stating that -

- *the donor directed the person to sign the EPA for the donor; and*
- *the donor gave the direction freely and voluntarily in the presence of the witness; and*
- *the person signed the EPA in the presence of the donor and the witness; and*
- *at the time, the donor appeared to the witness to have the capacity necessary to make the EPA.*

An EPA is effective in relation to an attorney only if the attorney has accepted the appointment in accordance with the legislation. This means -

- *the attorney must sign and date a statement of acceptance in the approved form, endorsed on or attached to the EPA; and*
- *the statement of acceptance must include an undertaking by the attorney -*
    - *to exercise their powers with reasonable diligence to protect the donor's interests;*
    - *to avoid acting where there is any conflict of interest between the donor's interests and the attorney's interests; and*
    - *to exercise the powers conferred by the EPA in accordance with the legislation.*

A person who is insolvent is not eligible to be appointed as an attorney.

An EPA is not revoked by the subsequent legal incapacity of the donor.

Proving an EPA

The ways in which an EPA may be proved include proof by a copy certified in accordance with the legislation by an authorised person (including a justice of the peace, a legal practitioner, a public notary, any officer authorised by law to administer an oath, or a financial services licensee and a regulated principal as defined in the Corporations Act 2001 (Commonwealth). This means -

- *each page of the copy, other than the last page, must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original; and*
- *the last page of the copy must be certified to the effect that the copy is a true and complete copy of the original.*

An EPA may be proved by a certified copy of a certified copy.

Powers and duties of the attorney

An attorney must keep and preserve accurate records and accounts of all dealings and transactions made under the EPA. The attorney may, if the attorney thinks fit, execute (sign) any instrument with the attorney's own signature and (where applicable) the attorney's own seal, and may do any other thing in the attorney's own name. However, this must be done so as to show that the attorney acts as attorney for the donor. The instrument will then have effect as if executed by the donor in the donor's name signed or signed and sealed by the donor.

An EPA does not authorise an attorney to make a decision about medical treatment for the donor and, if there is a guardian or an enduring guardian who makes a decision in the exercise of their power and the decision conflicts with a decision made by an attorney under an EPA, the decision of the guardian or enduring guardian prevails.

If VCAT appoints an administrator of the donor's estate, the attorney may exercise power under the EPA only to the extent authorised by VCAT.

Revoking an EPA

The donor may revoke the EPA in writing in the approved form.

An EPA is revoked, to the extent of any inconsistency, by a later EPA given by the donor.

An EPA is revoked when the donor dies.

An EPA is revoked according to its terms (eg. if an EPA is expressed to operate for or during a specified period, it is revoked at the end of that period).

An attorney may resign by signing a notice and giving it to the donor, but if a donor ceases to have legal capacity the attorney may resign only with leave of a court or VCAT. If the attorney resigns, the EPA is revoked to the extent that it gives power to the attorney.

If an attorney ceases to have legal capacity, or becomes insolvent, or dies, the EPA is revoked to the extent that it gives power to the attorney.

The legislation preserves the general law concerning the revocation or termination of an EPA.

VCAT may revoke an EPA if satisfied, first, that the donor lacks capacity to make an EPA and, secondly, that it is in the donor's best interests to do so.

In the case of 2 or more persons appointed jointly and severally, revocation in relation to 1 of them does not affect the appointment or the powers of the remaining attorney(s). On the other hand, in the case of 2 or more persons appointed jointly (but not jointly and severally), revocation in relation to 1 of them also revokes the power in relation to each of the other joint attorney(s).

Protection of attorney and third parties from liability

An attorney who in good faith and without knowing (or having reason to believe) an EPA is invalid purports to exercise the power is entitled to rely on the EPA despite the invalidity. Other persons who in good faith and without knowing (or having reason to believe) an EPA is invalid act in reliance on the purported exercise of an EPA by an attorney are entitled to rely on the EPA despite the invalidity.

Applications to VCAT

The donor, an attorney, the Public Advocate, or another person whom VCAT is satisfied has a special interest in the affairs of the donor may apply to VCAT for a declaration, order, direction or recommendation about any matter or question relating to the scope of the attorney's powers or the exercise of any power or any other thing in or related to the legislation.

Further information online

The approved EPA form and revocation of EPA form and an Information Pack can be obtained from the Victorian Department of Justice website - www.justice.vic.gov.au

Further information about EPAs can be obtained from the Office of the Public Advocate website - www.publicadvocate.vic.gov.au

Information about VCAT, including application forms and a Guide for Applications, can be obtained from the VCAT website - www.vcat.vic.gov.au

Information relating to EPAs made in other States and Territories can be obtained by following the links on the Australian Guardianship and Administration Committee website – www.ijcga.gov.au

2. Inappropriate reliance on privacy principles

Since the introduction of the *Privacy Amendment (Private Sector) Act* 2000 (Cth) ('the Act'), the BFSO has from time to time received general complaints to the effect that persons with either statutory authority or written authority, such as a financial counsellor with written authority to act, on occasion have difficulty in obtaining information or dealing with banks and that privacy legislation is given as the explanation.

In some cases it appears that the problem arises from an individual bank officer or department's misunderstanding of the effect of certain provisions in the Act. Occasionally the complaint indicates a more general misapplication of the privacy principles. The Act is not a legitimate reason to refuse to provide information about a customer to a person who is authorised by law to obtain that information or who has the consent in writing of the customer to do so.

In 2003, the BFSO received a complaint from one of the State Boards with statutory authority to appoint guardians and administrators and to conduct investigations in relation to a person's estate prior to hearing an application for guardianship or administration. The complaint was that a bank had refused to provide information to the Board about a person's accounts, citing privacy legislation.

The bank's response to the Board appeared to involve a misunderstanding of both the Act and the role and authority of the Board.

The BFSO raised the Board's concern with the bank, as it seemed undesirable that the powers of the Board and the protective purposes of the relevant legislation be frustrated by reliance on privacy legislation if that legislation in fact permitted the communication of information. The BFSO's view, and that of the Privacy Commissioner, who was also consulted by the Board, was that the Act did not prevent the relevant disclosure.

The bank investigated the matters raised by the dispute and advised that the refusal to provide information had been based on legal advice concerning the relevant legislation. As a result of the comments of the BFSO and the Privacy Commissioner, the bank reviewed that legal advice and confirmed that disclosure was permitted both under the privacy legislation and at common law as a qualification to the bank's duty of confidentiality. Compliance staff were

re-instructed about requests from the Board and the matter was satisfactorily resolved.

3. Accounts opened by administrators

Earlier this year the BFSO received a general complaint from the Queensland Guardianship and Administration Tribunal about what appeared to be a trend for banks to require bank accounts, opened by administrators in their capacity as administrator of a represented person, to be opened in the administrator's name as trustee. Administrators reported that they had been told by the bank that there was no alternative.

The usual way in which an appointed administrator should open a bank account is for the account to be in the name of the represented person. In the view of the Tribunal, opening the account as a trust account in the name of the administrator was not only in contravention of the relevant state legislation but created significant problems in regard to ownership, taxation, liability and deceased estate administration. One of the requirements of an administrator is to keep the represented person's property separate from their own property.

The Tribunal has asked the BFSO and other external dispute resolution schemes to assist in increasing awareness of the problems caused by the perceived trend. Further information can be obtained from the Tribunal registry on **1300 780 666**.

A general discussion of disability, incapacity and banking issues is contained in BFSO **Bulletin 31** available at www.bfso.org.au.

Update to Bulletin 40: Online and Offline Credit Card Fraud

Bulletin 40 raised a number of issues to do with the impact on small business of credit card fraud. At pages 5 and 6 of the Bulletin we raised the issue of merchants being listed with credit card schemes when their merchant facility was terminated. We expressed some concerns about whether the listing process was adequately disclosed. This also raises the issue of providing adequate information to merchants and the BFSO about the detail of the listing in the context of confidential card scheme rules. We have had some feedback on the issues raised and will be receiving a response from the Australasian Security and Risk Council.

The following case study describes a recent case where a resolution satisfactory to the merchant was obtained.

Merchant Fraud Case Study

Mr and Mrs A operated an Internet based business and were authorised to accept credit card sales by mail, telephone and the Internet. To offer additional security to the business' subscribers Mr and Mrs A utilised the services of a gateway that kept their customers' credit card details secure. Security measures were encouraged by the bank but the use of the gateway meant that Mr and Mrs A were unable to monitor and prevent individual transactions as they only became aware of the transactions after the gateway had obtained authorisation from the issuing bank and the transaction had been processed.

After operating under the merchant agreement for two years, Mr and Mrs A suspected that the business was being targeted by international fraudsters. They did everything they were required to do under the terms of the merchant agreement as well as the operational guides and other material produced and distributed by the bank. They attempted to verify the transactions and upon becoming suspicious contacted the bank to report the transactions they suspected were fraudulent. Mr and Mrs A also contacted several other law enforcement agencies, made changes to the business' website to capture details of the transaction to pass onto the bank and independently installed other measures to protect their business.

Mr and Mrs A complained that the bank did not investigate the fraudulent activity or assist them in their efforts to stop it. The bank's records indicated that, although the bank's operational guides offered to give merchant's instructions on what to do when confronted with suspicious transactions, the bank when requested did not provide Mr and Mrs A with any information or guidance. The bank did not counsel or educate Mr and Mrs A or warn them that they were at risk of being terminated if excessive chargebacks resulted from fraudulent transactions..

A few months after the first of the suspicious transactions Mr and Mrs A appeared on the bank's detection report with excessive chargebacks. Within two days the bank had terminated the merchant agreement without notice under a provision that allowed the bank to end the agreement with or without notice if the bank believed that the terminal had been used in a way that may cause loss to the bank.

Mr and Mrs A complained that the immediate termination of the merchant facility had a devastating effect on the Internet business. They discovered that they had also been placed on a database of terminated merchants and as a consequence found it impossible to obtain a merchant facility from another bank.

The case manager considered that while the bank was contractually entitled to terminate the merchant facility it should have, in the particular circumstances of this case, given Mr and Mrs A one month's written notice of termination. The case manager found that the bank failed to act consistently with its undertaking to provide advice and give guidance to merchants. Further, that given the serious consequences of termination without notice, the bank by failing to fully investigate and consult with the merchant had acted unfairly and contrary to good banking practice. The case manager also found that the merchant agreement did not sufficiently disclose that terminated merchants will be reported and included on Credit Card Scheme's databases that will be considered by banks in assessing applications for merchant facilities. An award of damages was made in favour of Mr and Mrs A to compensate them for financial and non-financial loss suffered as a result of the bank's actions.

Both Mr and Mrs A and the bank accepted the case manager's finding. Additionally as a gesture of goodwill the bank arranged for Mr and Mrs A's details to be removed from the Credit Card Scheme databases. The bank has also agreed to review its merchant agreement.

Identification requirements when cheques are cashed – consideration of Privacy issues

We have recently had to consider the *Privacy Act* obligations where a person attends a bank seeking to cash a cheque drawn by a customer of the bank. The bank on which the cheque is drawn will often require identification evidence when a person presents an open cheque payable to cash or bearer at the drawer's bank. The issue that we have had to consider is whether this breaches the privacy of the person presenting the cheque for payment.

The person seeking to cash the cheque may not be a customer of the bank. However, under the Ombudsman's Terms of Reference, this office can consider a dispute about a breach of privacy, even if the person is not a customer of the bank.

Relevant Privacy Principles

National Privacy Principle ("NPP") 1.1 provides that an organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

NPP 1.3 provides that at or before the time an organisation collects personal information, it must take reasonable steps to ensure that the individual is aware of the organisation's privacy policy.

NPP 8 provides that wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation.

The position of the bank

The response of the bank in such cases is that it is necessary to prevent fraud on the bank's customer. It could be argued that, as the cheque can be cashed by anyone, NPP 1.1 seems applicable because the identity does not appear necessary for the function or activity of cashing the cheque. For the reasons set out below, however, it is the view of this office that even if the taking of the identification is not a very strong fraud preventative measure, the request for identification evidence is necessary for one or more of the bank's functions or activities.

The duty of the bank

Where a person attends a bank seeking to cash an open cheque payable to cash or bearer, the paying bank's basic duty is to its customer. The holder of the cheque has rights against the drawer but none against the paying bank. (see

Commonwealth Trading Bank v Reno Auto Sales Pty Ltd [1967] VR 790 at 796.) Therefore, if the institution decides that there is any risk (eg of forgery) it may refuse to pay, but in doing so faces the risk of an action for wrongful dishonour by its customer. However, the paying bank must either honour or dishonour the cheque promptly. Failure to do so will make it liable to the holder of the cheque under Section 67 of the *Cheques Act*.

The need for identification – the effect of a forged cheque

Section 32 of the *Cheques Act* provides that a forged signature of a drawer on the cheque is wholly inoperative. It does not matter how good the forgery is. If the teller compares the signature and, without being an expert or subjecting it to detailed analysis, concludes that it appears to be the customer's signature, only to later discover that it is not, then the effect of this is that the bank will not have a mandate from its customer and will be paying away its own money. If it pays away its own money, it does so under the mistaken belief that it had a mandate from its customer and it would have a claim against the recipient of funds for moneys paid by mistake.

Similarly, if the cheque has been stopped, but the countermand has been overlooked, or if the bank is otherwise on notice that the cheque has been lost or stolen, then the bank pays away its own money and has a claim against the cashing party for the recovery of a payment by mistake. In relation to the law about payments by mistake, see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 and *Bank of New South Wales v Murphett* [1983] 1 VR 489.

Where the bank pays money by mistake in these circumstances, the identification evidence will provide the bank with a starting point for the recovery of the money from the recipient. False identification might be provided which gives the bank little practical redress, but our view is that the bank is nevertheless entitled to take some steps to obtain identification against the event that it needs to bring such a claim.

Section 63 of the *Cheques Act* provides that a person may present a cheque for payment by exhibiting the cheque at the proper place in relation to the cheque. Section 64 provides that the proper place in relation to a cheque is place of business specified on the cheque, or if no address is specified, then the branch where the drawer holds his account. If the cheque is presented at another branch of the bank, rather than the proper place, then the bank will usually pay the cheque, but in doing so, the cheque is not considered to be presented and paid, it is merely purchased (normally with recourse against the cashing party) by the cashing branch (see Weaver and Craigie *The Law of Banker and Customer* 3rd Ed. at para 9.4990 and the cases quoted therein).

As recourse is against the cashing party, it is reasonably necessary for the bank to obtain some form of identification of the cashing party in order that recourse can in fact be had.

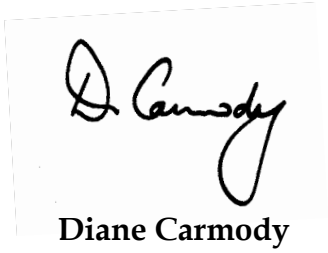
Where the cheque has been indorsed (that is transferred to another) then Section 94 of the *Cheques Act* provides that where the paying bank pays the cheque in good faith and without negligence, it does not have to concern itself by reason only of the indorsement having been placed without the authority of the person whose indorsement it purports to be. Acting in good faith and without negligence may arguably require the bank to obtain some evidence from the person cashing the cheque that they are the true owner of the cheque.

Application of National Privacy Principles - conclusion

There are good practical and legal reasons for a bank to require identification, such that NPP 8 would not apply.

It also follows that NPP 1.3 would apply in these cases, so that where the person presenting the cheque is not an existing customer of the bank and therefore would have already received a privacy statement, the bank would be required to provide a privacy statement at the time the information is provided.

Member banks should ensure that copies of their privacy policy are readily available for use by tellers when individuals seek to cash cheques over the counter. Staff training should also be undertaken to ensure that tellers are aware of the bank's Privacy Act obligations when cashing open bearer cheques over the counter for non-customers.



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